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ARTICLES

REGULATING GOVERNMENT COMMUNICATIONS

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... spin is a debilitating disorder in our democracy. Not to put too fine a point on it, it is a cancer on the body politic. It must be removed and purged for the health of the system

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former Director of Communications to Margaret Thatcher[1]

I. INTRODUCTION

IT is widely accepted that the British intelligence dossier of September 2002 claiming that Iraq possessed "weapons of mass destruction" (WMD) which could be deployed "within 45 minutes" was critical to the British Government's decision to invade Iraq in 2003. Given that no such weapons have materialized despite careful, comprehensive and labour-intensive searching, the dossier is now seen by many as a self-serving attempt by the Blair administration to "spin" the country into war. Although no consensus has yet emerged concerning who or what is to blame for the quality of the intelligence dossier and its presentational form,[2] notwithstanding the completion of two independent public inquiries (the Hutton Inquiry[3] and the Butler Inquiry[4]) seeking to investigate and analyse various events leading up to the war, the episode highlights the critical importance of integrity in government information and the potentially far-reaching "wages of spin."[5]

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[1] Sir B. Ingham, "Forward" (2004) 4 Journal of Public Affairs 223.

[2] See (2005) 58 Parliamentary Affairs, Issue 1.

[3] HC 247 of 2003–04, available at http://www.the-hutton-inquiry.org.uk/content/report (hereafter the "*Hutton Report*").

[4] HC 898 of 2003–04, available at http://www.butlerreview.org.uk/report (hereafter the "*Butler Report*").

[5] Sir B. Ingham, "The Wages of Spin", All Souls Seminar, All Souls College, Oxford, 17 October 2005. See (2003) *4 (2) Blueprint: The Newsletter of the University of Oxford* at [5].

While the infamous dossier was issued from the Prime Minister's office, it must be borne in mind that public officials from all levels of government routinely seek to communicate, to the public directly and to other government officials, in a wide array of formats, for a diverse range of purposes and with varying levels of formality. It has long been recognized that information may be a potentially powerful policy instrument through which the government may seek to shape and influence behaviour, not only through paid for publicity (in the form of advertising, direct marketing and other professionally developed publicity campaigns)[6] but also through more routine administrative channels, such as policy guidelines and announcements, information circulars and other forms of explanatory material.[7] Accuracy and reliability in government information is particularly important in modern life, given that citizens invariably look to government sources for guidance when faced with potentially hazardous risks typically associated with large-scale industrialisation and production, with various social psychological studies indicating that individuals tend to assume that official sources of information are likely to be more reliable than unofficial sources.[8] But the integrity of government information, defined in terms of its accuracy, comprehensiveness and reliability, ought not lightly be assumed, as the Iraq dossier powerfully demonstrates. Accordingly, the primary aim of this paper is to identify, examine and critically evaluate the nature of executive and judicial mechanisms for safeguarding the integrity of the form and content of government information.

In so doing, I seek to build upon Terrence Daintith's "constitutional analysis of spin," in which he defines spin as a "deliberate attempt to present its subject in the best possible light" but "does not necessarily connote the presence of any unethical or morally unacceptable conduct".[9] Daintith's analysis provides an illuminating analytical framework for considering how, if at all, spin is constitutionally recognized and controlled. He discusses a broad and varied range of constitutional and quasi-legal mechanisms for regulating and controlling government information,

[6] Estimated to cost approximately £230 million per year, with 2600 people working directly in communications directorates in the government sector at an annual cost of £90 million: Communications Review Group, *An Independent Review of Government Communications* (Cabinet Office, London 2004) at [9]. (Hereafter the "Phillis Report".) The Phillis Report referred to these figures as a "best estimate", lamenting the lack of readily available statistics on the scale of the government's communications effort.

[7] See the discussion at pp. 71–72 below.

[8] B. Fischhoff, "Risk Perception and Communications Unplugged—20 Years of Process" (1995) 15 Risk Analysis 137; S. Hunt, L.J. Frewer and R. Shepherd, "Public Trust in Sources of Information About Radiation Risks in the UK" (1999) 2 Journal of Risk Research 167.

[9] T. Daintith, "Spin: A Constitutional and Legal Analysis" (2001) 7 European Public Law 593, at p. 594.

encompassing general legal rules applicable to the making of public statements (including the laws of defamation, breach of confidence and negligent misstatement), rules of Parliamentary conduct that may bear upon government speech, advertising codes of conduct administered on the basis of industry self-regulation and internal regulations applicable to the civil service. My discussion seeks to deepen and extend his analysis in two ways: first, I explore in greater depth the existing scheme of executive self-regulation applicable to government information by subjecting the substance of internal regulatory conventions concerning government information to critical scrutiny and by exploring the role and function of special advisers; and second, I consider the capacity of judicial review as a mechanism for regulating and controlling the integrity of government statements.

To this end, my discussion proceeds in three stages. I begin by examining the existing executive framework for regulating the integrity of government information, focusing on the propriety conventions currently set out in the Guidance on Government Communications.[10] In so doing, I will argue that the distinction between legitimate policy exposition and illegitimate party political propaganda upon which the propriety conventions rest provides a slippery and elusive foundation that may not lend itself to principled and consistent application. Although politically appointed special advisers, whose task is to mediate the overlap between party political and administrative policy-based public communications, are intended to act as a kind of political buffer, by providing a bridge between government and party, the use of special advisers has served instead to muddy the already murky waters, further undermining the perceived integrity of government communications. Debate concerning the Iraq dossier and the extent to which it was improperly ''sexed up'' serves as a striking illustration of the imprecision that plagues the concept of spin and the consequent scope for manipulation and disagreement concerning the integrity of particular pronouncements. In light of the difficulties inherent in existing internal mechanisms for ensuring the integrity of government information, the second part of my discussion shifts the focus to the courts, seeking to examine whether, and to what extent, judicial review may provide an

[10] Guidance of Government Communications: http://www.comms.gov.uk/guidance/propriety/government-communications.htm. These conventions were formally reconciled in writing for the first time by the Cabinet Office, in response to the Widdicombe Committee's inquiry into publicity campaigns in local government in 1984–5, after the committee asked to be provided with information about the practice of central government: *Interim Report of the Committee of Inquiry into the Conduct of Local Authority Business*, HMSO 1985, paras. 116–9. In 1997, the guidelines based on these conventions (which were subsequently known as the ''Widdicombe Conventions'') were drawn up by the Mountfield Review Group: see n.13 and associated text.

alternative institutional mechanism for ensuring the integrity of government pronouncements. My discussion of judicial review centres on the availability of review in relation to government statements of a general nature, rather than government pronouncements singling out named individuals or institutions that may therefore be at risk of impinging upon individual rights to privacy and fair procedures. It will be argued that judicial review provides a useful backstop for ensuring the legal accuracy and integrity of government statements, in which courts adopt an appropriately light touch when scrutinising the content and presentational form of government statements. Thirdly, I reflect upon the distinct and complementary functions served by executive self-regulation and judicial review, identifying areas of similarity and difference, and pausing to consider their relationship to each other.

I will suggest that the scope of the oversight provided by executive self-regulation and judicial review is shaped by the British constitutional framework in which Parliament plays the primary role for safeguarding against executive impropriety through the operation of the constitutional convention of ministerial responsibility. Accordingly, although both systems of oversight help ensure the integrity of government communications, their scope and function is appropriately limited and secondary in nature. The soft-edged nature of communications activity invariably requires the making of sensitive and subjective judgements which not only elude the reach of formal mechanisms of control, but also entail the making of political judgements which neither system is institutionally competent to adjudicate upon. In my concluding discussion I will suggest that the current and persistently high levels of public mistrust in government pronouncements may provide further evidence of the inability of Parliament to discharge its supervisory functions effectively in the face of executive dominance.

II. Internal Control Through Executive Self-Regulation

A. The Civil Service Propriety Conventions

Although the civil service has long been subject to internal regulation taking a variety of forms,[11] the government's information functions did not become the subject of specific internal regulations until the 1970s in the form of a system of quality standards, originally printed as an annex to the "Red Book", the predecessor to the current Guidance on Government communications (the

[11] The general framework of civil service regulation is discussed in section C below.

"Guidance") issued by the Cabinet Office, Government News Network.[12] These propriety conventions represent established conventions defining how civil servants can properly and effectively present the policies and programmes of the government of the day. They are issued to government information officers in order to provide specific, concrete guidance in upholding the Civil Service Code requirement that civil servants conduct themselves with "integrity, impartiality and honesty" in the performance of their duties. While both the Mountfield Report[13] and the more recent Phillis Report[14] on Government Information Services affirmed the importance of retaining political impartiality in the effective communication of government policy, the mechanisms for monitoring and enforcing compliance with the conventions have remained largely unaltered. The responsibility for ensuring that the conventions on propriety are observed rests with departments and, in particular, with departmental ministers and heads of department.[15] Any conflicts and queries relating to the propriety conventions can be referred from a department (via its Head of Information or directly) to the Permanent Secretary, Government Communications[16] for advice or referral to the Propriety and Ethics Team within the Central Secretariat of the Cabinet Office (formerly the Machinery of Government and Standards Group) or the Head of the Home Civil Service (*i.e.* the Cabinet Secretary).[17] The latter does not, however, have formal authority to block government statements or information campaigns, occupying the position of standard setter, adviser and keeper of past precedents.[18]

[12] Revised by the Cabinet Office in July 1997 to re-draft and tighten up the text, while retaining the substance of the existing conventions, available at http://www.comms.gov.uk/guidance/propriety/conventions.htm. Prior to the replacement of the Government Information and Communications Service (GICS) by the Government Communications Network (GCN) in January 2005, the propriety conventions were contained in the Guidance on the Work of the Government Information Service (GWGIS), together with a set of Guidance Notes (hereafter "Guidance Notes") and available at www.cabinet-office.gov.uk/central/1999/workgis/workgis.htm accessed on 10 March 2004. The Guidance Notes now appear to have been removed from the Cabinet Office website.

[13] Cabinet Office (Office of Public Service), *Report of the Working Group on the Government Information Service* (November 1997), (hereafter the "Mountfield Report").

[14] Phillis Report, note 6 above.

[15] Guidance Notes, note 12 above, para. [28].

[16] The position of Permanent Secretary, Government Communications (PSGC) was created by the government following the recommendations of the Phillis Report as a civil service post, based in the Cabinet Office, with responsibility for managing the government communications function within central government. The PSGC is publicly accountable for the application of the propriety guidelines via the Public Administration Select Committee, providing evidence as required.

[17] There is now a full-time post in the Cabinet Office, whose holder is appointed by the Cabinet Secretary with the approval of the Prime Minister. T Daintith, "A Very Good Day to Get Out Anything we want to Bury" [2002] P.L. 13.

[18] National Audit Office, *Government Advertising*, April 2003 para. [3.3] (hereafter "NAO Review").

The Guidance contains four basic conventions, applying to the content, style and distribution of government information and which have been applied by successive governments, requiring that government communications should:

(i) be relevant to Government responsibilities
(ii) be objective and explanatory, not tendentious or polemical
(iii) not be, or be liable to misrepresentation as being, party political; and
(iv) be conducted in an economic and appropriate way, having regard to the need to be able to justify the costs as expenditure of public funds

Underlying the convention requirements is a perceived distinction between legitimate policy explanation and illegitimate party propaganda. The Guidance Notes[19] attached to the Guidance state that it is "right and proper" for governments to use Civil Service Information Officers and public funds and resources to explain their policies and inform the public of government services available to them, and of their rights and liabilities. But these resources may not be used to support publicity for party political purposes.[20] This distinction is fleshed out in the Guidance Notes on convention (iii) which provides that:

> It is entirely proper to present and describe the policies of a Minister, and to put forward the Minister's justification in defence of them, and this may have the effect of advancing the aims of the political Party in Government. It is not, however, proper to justify or defend those policies in Party political terms, to use political slogans, expressly to advocate policies as those of a particular political Party or directly attack (though it may be necessary to respond to in specific terms) policies and opinions of Opposition Parties and groups.[21]

The foundation of the propriety conventions ultimately rests upon the constitutional convention that governments should use public funds for the purposes of government and not for the benefit of their political party.[22] It is recognized that government information serves a vital and important purpose in the administration of government policy. As the Mountfield Report observed, Government policies will ultimately fail if they are not capable of being explained convincingly to, and accepted by, the citizen.[23]

[19] See note 12 above.
[20] Guidance Notes, note 12 above, para. [4].
[21] Guidance Notes, note 12 above, para. [8].
[22] Lord Wilson of Dinton, "The Robustness of Conventions in a Time of Modernisation and Change" [2004] P.L. 407.
[23] Mountfield Report, note 13 above, recommendation [1.1].

Thus, in order to aid public understanding and so maximize the effectiveness of its policies, it is a proper and necessary function of a democratic government to inform and to communicate its policies and achievements positively. Accordingly, the conventions accept the right of a Minister to use government press officers to ensure that Government policy and actions are explained and presented in a positive light, and the best possible opportunity is taken to convey its message to the public through the media.[24] On the other hand, it is improper for government press offices and resources to be used primarily or significantly for party political ends. But the distinction between the proper, pro-active exposition of policy, and improper party-political propaganda, is a notoriously difficult one to draw.

The inherently blurred contours of the boundary between policy exposition and party propaganda opens up a considerably wide margin of opportunity for spin and political manipulation. Although allegations that government communications frequently lack integrity due to the pervasive use of spin are commonplace, the meaning of spin is itself plagued with uncertainty, lending itself to a broad range of interpretations. At its most extreme, spin might refer to the presentation of information in a manner that, although strictly speaking truthful in content, is deliberately calculated to mislead. Spin might, however, be understood as the presentation of information falling short of a deliberate attempt to mislead, but nevertheless entailing the positive promotion of a particular viewpoint or agenda and, to that extent, might be thought to lack objectivity and impartiality. In its most dilute form, spin might simply refer to the presentation of policy in a positive light with the aim of encouraging citizens to support or at least accept its validity. It is clear from the propriety conventions that the latter presentational approach is considered acceptable and desirable while the former is thought to be wholly unacceptable, but there is considerable room for disagreement concerning how approaches falling within the intermediate style of presentation would be characterized. As the Mountfield Report stated, "[a]though advocacy as such is not within the conventions, vigorous exposition of the Minister's policies and the reasons Ministers themselves use as justification for those policies are properly functions of effective GICS staff."[25] But it is highly doubtful whether any principled, let alone clear-cut, distinction can be drawn between "advocacy" on the one hand and "vigorous exposition of policy" on the other. Mountfield's claim that "advocacy as such is not within the

[24] Guidance Notes, note 12 above, para. [12 iii].
[25] Mountfield Report, note 13 above, recommendation [1.3].

conventions'' seems to suggest that advocacy was regarded by the Mountfield review team as lacking the degree of impropriety associated with political propaganda although having a stronger political orientation than ''mere'' policy exposition, given that the purpose of advocacy is to persuade citizens to accept a particular viewpoint rather than simply provide an objective explanation of policy.

Although the distinction between policy exposition and party propaganda lies at the heart of the propriety conventions, unavoidable overlap arises in so far as positive policy exposition may indirectly serve to cast the governing party in a positive light. This overlap is recognized in the Guidance Notes by acknowledging that the effectiveness with which the government communicates its policies and presents information about them carries political benefits, stating that ''it is possible that a well-founded publicity campaign can create political credit for the Party in Government,'' but this must not be the ''primary or a significant purpose'' of government information or publicity activities.[26] These beneficial political by-products were considered by the Mountfield Review to form part of the ''natural advantages of the incumbent that may accrue to the government party under the British political system.''[27] While the propriety conventions appear to regard the *underlying motivation* for the dissemination of government publicity as critical to its characterisation, disentangling party-political motivations from a well-meaning desire to secure effective policy implementation is unlikely (if not impossible) to be achievable in government communications practice, given the subjectivity and overlap involved. For this reason, the role of special advisers appears to offer a potentially valuable mechanism for mediating the overlap, and to which we now turn.

B. Special Advisers, Government Communications and the Iraq Dossier

Special advisers are party political appointees who are intended to play a mediating role by providing a channel of communication between the governing political party and the Government.[28] They are appointed by Ministers to deal with ''matters where the work of the Government and the work of the Government Party overlap

[26] Guidance Notes, note 12 above, para. [8].
[27] Mountfield Report, note 13 above, recommendation [1.2].
[28] The present general arrangements for appointing special advisers are set out in the Ministerial Code and the Code of Conduct for Special Advisers: Cabinet Office, *Ministerial Code: A Code of Conduct and Procedural Guidance for Ministers* (London July 2005), hereafter '' ''Ministerial Code''; and Cabinet Office, *Code of Conduct for Special Advisers* (London, July 2005), hereafter ''Code of Conduct for Special Advisers''.

and it would be inappropriate for permanent civil servants to become involved."[29] Although special advisers have been much maligned, the Phillis Review referred to their role and functions in unequivocally positive terms. It considered special advisers to be an integral part of modern government, whose political affiliation is both welcomed by Ministers and an important buttress to the impartiality of the Civil Service.[30] In the context of government communications, special advisers were considered by Phillis to occupy a particularly valuable and important role: they may speak on behalf of the Minister in political terms, presenting the underlying political thinking or the Minister's general approach in support of a particular policy or the Government's overall political philosophy.[31] Political advocacy of this nature is considered to fall outside the duties of the government information officers as permanent civil servants, on the basis that such activities would compromise their political neutrality.

Not only is the role of special adviser intended to help preserve the political impartiality of permanent civil servants, but it is also thought to promote the interests of the governing party. Just as it is accepted that Government policy must be publicly communicated in a positive manner in order to secure effective policy implementation, thereby constituting a proper use of public funds, it is also accepted that it would be damaging to the Government's policy objectives if the ruling political party took a different approach to that of the Government. On this basis, the Code of Conduct for Special Advisers recognizes the need for the special adviser to act as a channel of communication between the Government and party, so as to ensure that party publicity is factually accurate and consistent with Government policy and that party MPs and officials are briefed on issues of Government policy.[32] In short, by acting as both a bridge and political buffer between Government and ruling party, the special adviser's role may be seen as promoting effective government policy implementation by providing a means by which the Minister's political thinking may be publicly communicated while concurrently safeguarding the political impartiality of government information officers.

Given the explicitly political role occupied by special advisers, their primary duties of loyalty appear to lie with their appointing political party. Their constitutional position is, however, somewhat

[29] Code of Conduct for Special Advisers, *ibid.*, para. [2].
[30] Phillis Report, note 6 above, at para. [21].
[31] Communications Review Group, *Interim Report* (August 2003) at Appendix B to the Phillis Report (see note 6 above) at para. [13], hereafter the "Interim Phillis Report".
[32] Code of Conduct for Special Advisors, note 28 above, para. [14].

unusual for they are appointed as temporary civil servants under the prerogative.[33] As civil servants, they are required to conduct themselves in accordance with the requirements of the Civil Service Code, but as temporary political appointees, they are not bound by the same obligations of neutrality and impartiality that apply to the permanent Civil Service.[34] With the exception of up to three special advisers in the Prime Minister's office,[35] special advisers are situated outside the civil service management line and their powers are limited to "advice only" so that they cannot issue instructions to permanent civil servants or otherwise manage executive operations. Prior to 2001, special advisers were not members of the Government Information and Communications Service (now the Government News Network) and therefore the Guidance[36] (and hence the propriety conventions) was not seen as applicable to them. Although unease had been expressed by various parliamentary select committees[37] about the media role occupied by many special advisers, it was not until July 2001 that the Blair government eventually accepted the Committee on Standards in Public Life's proposals for a specific regulatory code, promulgating the Code of Conduct for Special Advisers which subjected special advisers to the Guidance and hence to the propriety conventions.[38] Daintith comments, however, that this was a less significant step than it appears because virtually the whole contents of the Code previously appeared as Schedule 1 to the Model Contract for Special Advisers 2000, so that promulgation of the Code wrought only two substantive changes.[39] First, inviting any civil servant who believes that action by a special adviser is in excess of authority or breaches the Civil Service Code to raise the matter immediately with the Secretary to Cabinet or First Civil Service Commissioner. Secondly, by explicitly recognising that special advisers may brief the media, an activity that previously had no explicit coverage in the Model Contract. Prior to that, briefing responsibilities were limited to briefing party MPs and officials, fitting within the broad area of government-party relations. This activity must now be carried out in accordance with the requirements of the propriety conventions, although as Daintith indicates, presumably subject to

[33] Civil Service Order in Council 1995, Article 3(2).
[34] Code of Conduct for Special Advisers, note 28 above, para. [4].
[35] Civil Service Order in Council 1995, Article 3(3).
[36] Formerly the Guidance on the Work of the Government Information Service.
[37] Daintith, note 17 above.
[38] Committee on Standards in Public Life, Sixth Report, *Reinforcing Standards* (Jan 2000), vol. 1, Cm 4557-I.
[39] The Model Contract was established in May 1997 as the basis for the employment of special advisers, superseding the previous system by which special advisers received only letters of appointment.

the adviser's general ability to act in a politically committed way so that proprietary convention (iii) would not apply.

In light of the preceding account of the role and function of the special adviser, supported by the Phillis Review's positive endorsement, it may appear rather puzzling that special advisers in government communications (or political "spin doctors" as they are known in popular parlance) have been the subject of extensive and sometimes vehement criticism. Many political and media commentators have attributed the current unease and apparent lack of public trust in the integrity of government information to the powerful position occupied by special advisers, owing to their capacity to act as critical gatekeepers, controlling the conditions of access to and from Whitehall and exemplified in the conduct of Alistair Campbell, Prime Minister Blair's former special adviser and Director of Communications.[40] For example, Clare Short once notoriously described special advisers as the "people who live in the dark," referring to their penchant for working in the shadows, seeking to influence the news media, trading in gossip on an unattributable basis and often denigrating their colleagues in the process.[41] Yet the propriety conventions and the Code of Conduct for Special Advisers are silent on questions of access. While the Ministerial Code provides authority for the co-ordinating and leadership role of the Chief Press Secretary and the No. 10 Press Office, it does not account for the ability of special advisers in government communications to exert extensive informal control and influence over the access, timing and content of government announcements.[42]

Quite apart from the extensive informal gatekeeping powers that special advisers can exert over access to government information, it may be argued that at least part of the disenchantment concerning the practice of spin by special advisers may be attributed to two further sources. First, the institutional framework within which special advisers work suffers from weaknesses that may ultimately be attributed to the inherently unstable distinction between legitimate policy promotion and illegitimate political propaganda upon which the current regulatory framework is structured.

[40] Sir C. Foster, *British Government in Crisis* (Oxford 2005).

[41] A. Blick, *People Who Live in the Dark* (London 2004); N. Jones, "Shadows Boxing" [2004] 6 British Journalism Review 79.

[42] Ministerial Code, note 28 above, para. [88] provides: In order to ensure the effective presentation of Government policy, all major interviews and media appearances, both print and broadcast, should be agreed with the No 10 Press Office before any commitments are entered into. The policy content of all major speeches, press releases and new policy initiatives should be cleared in good time with the No 10 Private Office; the timing and form of announcements should be cleared with the No 10 Press Office. Each Department should keep a record of media contacts by both Ministers and officials. On the status of the Ministerial Code, see section C below.

Secondly, lack of clarity and consensus concerning the definition of "spin" or, perhaps more accurately, between acceptable and unacceptable forms of spin, leaves the exercise of extremely broad discretionary powers to the ethical judgement of the special adviser, without adequate mechanisms of constraint or oversight. In support of these claims, and to illustrate some of the difficulties and tensions associated with the public presentation of government policy and the role of special advisers, the following discussion draws upon the findings of the Hutton and Butler Inquiries concerning the preparation and presentation of the infamous Iraq dossier.

In broad terms, the central allegation at the heart of the controversy over the Iraq dossier revolved around the accusation that the dossier had been "sexed up," on the instruction and advice of Alastair Campbell to present the Government's intelligence-based assessment of Iraq's weapons capabilities under Saddam Hussein in terms that were known to be stronger than that which available government intelligence could properly support. As a result, it was alleged that the British public had been misled into accepting the justifications offered by the Blair administration in support of the Iraq invasion. The Hutton Inquiry was established by the Secretary of State for Constitutional Affairs "urgently to conduct an investigation into the circumstances surrounding the death of Dr Kelly",[43] the latter being a former UN weapons inspector and biologist employed by the Ministry of Defence to advise on Iraq's weapons capability who committed suicide during widely publicised controversy emerging from a BBC television program involving allegations about the integrity of the Iraq dossier. In so doing, the Hutton Inquiry interpreted its terms of reference as requiring it to consider the claim that 10 Downing Street ordered the Iraq dossier to be "sexed up." In contrast, the terms of reference of the Butler Inquiry were focused upon investigating the intelligence coverage available on WMD programmes of countries of concern, and as part of this work, to investigate the accuracy of intelligence on Iraqi WMD up to March 2003.[44]

While both reports run to several hundreds of pages, several key findings emerge from them that will suffice to illustrate the problematic nature of the role and influence of special advisers and the alleged distinction between policy explanation and party propaganda in the public presentation of government policy. First, the dossier was issued from the Prime Minister's office, so that the

[43] Hutton Report, note 3 above, terms of reference.
[44] Butler Report, note 4 above, terms of reference. Available at http://www.butlerreview.org.uk/terms-of-reference/index.asp.

Prime Minister would be politically and constitutionally responsible for its contents and presentation. It was therefore appropriate and in accordance with accepted government communications practice that the contents and presentation of the document would be vetted by the PM's advisers, including Alistair Campbell, prior to its public release.[45] Secondly, it was the PM's specific intention that authorship of the document be explicitly credited and attributable to the Joint Intelligence Committee (JIC), chaired by John Scarlett, an intelligence officer.[46] This was motivated by a desire to convince the British public of the sound evidential basis upon which the Blair administration sought to justify its policy in favour of military intervention in Iraq.[47] But by seeking to utilise intelligence in this fashion, Blair took a wholly exceptional and unprecedented step, for intelligence information had hitherto not been made publicly available and relied upon by Ministers in this manner.[48] Thirdly, Alistair Campbell had put pressure on John Scarlett in his preparation of the dossier by making it known that the Prime Minister was anxious for the dossier to make "as strong a case as possible" in relation to Iraq's WMD capabilities, but both the Hutton and Butler Reports accepted that Campbell had made it clear to Scarlett that the dossier should not contain anything that the intelligence services were unhappy about.[49] Thus, the Hutton Report concluded that claims that Alistair Campbell had "sexed up" the dossier were unfounded, in so far as this allegation was taken to mean that the presentation of the dossier had been motivated by a deliberate intention knowingly to mislead the British public about the strength of the case for an invasion of Iraq. The Hutton Report did not, however, rule out the possibility that the Prime Minister's desire to have a dossier which was "as strong as possible" in relation to the threat posed by Saddam Hussein's WMD may have "subconsciously" influenced Scarlett and the JIC in the presentation of the dossier.[50] Finally, in the process of translating the intelligence information of the JIC into a document for public and Parliamentary presentation, Butler

[45] Hutton Report, note 3 above, summary of conclusions (vii) at [320]: "As the dossier was one to be presented to, and read by, Parliament and the public, and was not an intelligence assessment to be considered only by the Government, I do not consider that it was improper for Mr. Scarlett and the JIC to take into account suggestions as to drafting made by 10 Downing Street and to adopt those suggestions if they were consistent with the intelligence available to the JIC."

[46] Butler Report, note 4 above, para. [463].

[47] *Ibid.*, paras. [463], [466].

[48] A. Glees, "Evidence-based Policy or Policy-based Evidence? Hutton and the Government's Use of Secret Intelligence" (2005) 58 Parliamentary Affairs 138.

[49] Butler Report, note 4 above, para. [464]. Hutton Report, note 3 above, summary of conclusions (v) at [320].

[50] Hutton Report, note 3 above, Summary of Conclusions (vii) at [320].

concluded that "warnings about the limited intelligence base" on which some aspects of the assessment of the WMD threat were made were lost, which "may have left with readers the impression that there was fuller and firmer intelligence behind the judgements than was the case" so that judgements in the dossier "went to (although not beyond) the outer limits of the intelligence available."[51]

Taken together, these findings illustrate many of the challenges and tensions thrown up in the public presentation and communication of government policy.[52] The episode highlights a number of issues, including:

(a) the lack of clarity and consensus surrounding the definition of "spin" and in distinguishing legitimate from illegitimate spin. It is apparent that Blair was keen to present the case in favour of invasion as powerfully as he believed the evidence could bear, and steps were therefore taken to present the available intelligence information in the strongest possible light. While Hutton concluded that action taken by Campbell and the No 10 Press Office in relation to the dossier did not amount to a knowing and deliberate attempt to overstate Iraq's weapons capability, it may be argued that on matters of such profound national and political importance, the importance of accuracy and objectivity in the presentation of policy becomes even more vital, so that Hutton's understanding of the term "spin" in this context was unduly narrow;

(b) the difficulties and artificiality in attempting to separate party-political motivations for specific government pronouncements from those motivated by a desire to justify and explain government policy for the purposes of promoting good public administration. By presenting the case in favour of the invasion of Iraq as strongly as possible, the Prime Minister's office could be seen as explaining and justifying the government's policy on Iraq in a positive light in order to win public support for its actions and enhance the likelihood that its policies would be publicly regarded as legitimate. To the extent that the Prime Minister was seen as successful in this enterprise, this would also provide positive political capital in support of the Labour party as the party holding office;

(c) the power and capacity of special advisers to influence the presentation of government policy and impose pressure on civil servants to pursue party-political ends. Indeed, Campbell was one of only two special advisers then invested with executive powers to

[51] Butler Report, note 4 above, para. [464]. Glees argues that Blair made a fundamental error of judgement to decide to share his intelligence with the public. He comments that intelligence which should have been used to shield Britain was instead exploited for political purposes and pushed to become a substitute for judgement and foresight. Glees, note 48, at p. 154.

[52] Foster, note 40 above, at pp. 244–8.

issue instructions to civil servants and he was therefore empowered to issue instructions to the JIC about the presentation of the dossier.[53] Following the Phillis recommendations, however, the Blair government has restructured the institutional arrangements supporting the Prime Minister's Press Office, so that the head of communications is no longer a special adviser but a permanent civil servant (the Permanent Secretary Government Communications), although the PM's Chief of Staff (currently Jonathan Powell) continues to hold executive powers;[54]

(d) how Blair's attempt to trade on the credibility of civil service expertise by consciously and publicly seeking to attribute authorship of the dossier to the JIC may be seen as both symptomatic of the decline in trust of government communications, insofar as pronouncements that were directly attributable to the intelligence services were more likely to be publicly regarded as credible when compared with Prime Ministerial assurances of the strength of the case for war, and as an attempt to politicise the advice thereby provided.[55] In light of its investigation, the Butler Report warned against the risks associated with politicising intelligence information, concluding that if intelligence is to be used more widely by governments in public debate in future, it will be essential that clearer and more effective dividing lines between assessment and advocacy are established when doing so;[56] and

(e) the importance of presentation of government policy, and the irresistible pressure on Ministers to clothe their policy choices in the most attractive media-receptive wrapping, which may generate presentational biases in favour of simplicity and sensationalism over thoroughness and accuracy,[57] reflected in the Butler Reports findings that important caveats had been "lost" in the process of translating intelligence information into publicly digestible form.

[53] I am indebted to Sir Christopher Foster for pointing out to me that John Scarlett was not a civil servant but a spy and, as such, his position in relation to the Civil Service Code is therefore somewhat more complicated. Apparently, it was unprecedented that the Cabinet Secretary, Andrew Turnbull, was not made aware of the instructions issued to the JIC and therefore not in a position to protest. Sir Christopher Foster claims that, had the matter been properly minuted and retained on file, and the dossier been prepared as a Cabinet paper, the resulting fiasco may have been avoided. See also Foster, note 40 above, at p. 246.

[54] Civil Service Order in Council 1995, Article 3(3).

[55] Jones, note 41 above, comments that over recent months, ministers have been deluged with reports recommending a tighter code of conduct for special advisers and improved safeguards for information officers who fear their work is being politicised. See Foster, note 40 above, at p. 248.

[56] Butler Report, note 4 above, para. [468].

[57] Phythian comments that the process of producing the September 2002 dossier needs to be seen in the context of the propaganda requirements of democratic nations preparing for war. He regards the dossier as an "inglorious episode" in the propaganda tradition. That is, propaganda known to be propaganda can be readily dismissed as almost useless. But if disguised as news and information, it is more palatable to traditional western notions of the public's right to know. M. Phythian, "Hutton and Scott: A Tale of Two Inquiries" [2005] 58 Parliamentary Affairs 124, at p. 136.

Yet such apparently minor omissions may have drastic and far-reaching consequences, as the episode powerfully demonstrates.

C. Internal Regulation: An Appraisal

The public controversy surrounding the Iraq dossier illustrates the importance of integrity in government communications, the conflicting pressures that may influence their form and content and draws attention to the institutional dynamics that shape and constrain the presentation of government policy. The episode throws into high relief how the government's desire to garner support for its policies may pull sharply against the need for objectivity and impartiality in the public presentation of government policy. The propriety conventions applicable to government communications reflect cherished and long-held values of honesty, objectivity and impartiality which the British permanent civil service seeks to embody. Underlying these conventions is a perceived distinction between legitimate policy explanation and illegitimate party propaganda. Yet this distinction is infused with uncertainty in theory and even more so in practice. Where one draws the dividing line will inevitably depend to some extent upon the exercise of subjective judgment, influenced by the surrounding context in which any specific pronouncement arises. Although it is necessary and desirable that the government actively seeks to explain its policies to the public, and to do so in positive terms in order to secure effective policy implementation, it is difficult to identify in any principled way where explanation ends and advocacy begins and a significant margin of overlap exists where reasonable differences of opinion may arise.

In theory, the role of the special adviser appears to offer considerable potential as a bridge between the government and ruling party, serving as a political buffer that may help preserve and maintain the impartiality of permanent civil servants. In practice, however, special advisers in government communications appear to have brought political pressure to bear on permanent civil servants tending to erode, rather than to reinforce, their impartiality. This may be at least partly attributable to the intractably flawed role of special advisers and the conditions under which they are appointed.[58] As temporary civil servants, special

[58] See the Wicks Committee recommendations to put the Civil Service Code and Code of Conduct for Special Advisers on a statutory footing: Committee on Standards in Public Life, Ninth Report, *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service* (April 2003) Cm 5775. Debate about the necessity or the desirability of putting the role and functions of civil servants on a statutory footing have also highlighted the lack of clear boundaries delineating the proper relationship between civil servants and special advisers: see Draft Civil Service Bill Cm 6373/2004 and Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill 2006.

advisers are bound by the Civil Service Code of Conduct, employed from public funds to serve the objectives of the Government and the department in which they work.[59] On the other hand, as political appointees they are also required to serve their political masters. In the context of government communications, these two duties might be seen as broadly aligned in so far as the effectiveness of communications ultimately depends on public trust in the integrity and credibility of the communicator. Yet in the context of modern political practice, in which media coverage operates around the clock on a daily basis and in which social institutions compete for press coverage, the special adviser is faced with dual and conflicting loyalties. It seems that the long term need to generate and sustain public trust is in practice overshadowed by the short term demands of positive media coverage for political gain, so that the temptation to engage in spin becomes almost irresistible, particularly in light of the limited tenure of special advisers and the fact that they are dependent upon party patronage for their continued appointment.

But here we encounter a further difficulty: in defining the meaning of "spin" itself. Daintith's definition of spin as a "deliberate attempt to present its subject in the best possible light" but "does not necessarily connote the presence of any unethical or morally unacceptable conduct"[60] suggests that some kinds of spin may be unethical or morally unacceptable, but this may not be true of all forms of spin. Although deliberate lies and deliberate attempts to mislead would readily be understood as morally unacceptable, it is uncertain whether conduct falling short of this degree of improbity should also be regarded as unethical. Ultimately, existing internal mechanisms for ensuring integrity in government communications rely for their effectiveness upon a strong ethical culture in which honesty and truth are considered inviolable, in which individuals responsible for government communications can be relied upon to exercise judgement that reflects and gives expression to ethical norms of propriety. But a lack of clarity and consensus concerning the content and, in particular, the parameters of those ethical norms, opens up extensive opportunities for manipulation to achieve short term political gain at the expense of long term integrity and credibility in government communications. To some extent, it seems unfair to lay responsibility at the door of special advisers, given the dual allegiance that characterises their position and the ambiguity infusing the notion of spin itself.

[59] Code of Conduct for Special Advisers, note 28 above, para. [6].
[60] Daintith, note 9 above, at p. 594.

Nor is it fair to lay the blame at the door of the propriety conventions and the system of internal regulation within which they operate. The propriety conventions provide guidance to civil servants engaged in public communications activity to ensure that they do not stray beyond the realm of positive policy exposition into party political propaganda. The risk that this boundary will be overstepped lies not primarily with civil servants themselves, but with Ministers to whom civil servants are required to serve loyally and impartially. As the Iraq dossier illustrates, the real danger that the propriety conventions may be violated stems from the risk that Ministers will bring pressure to bear on civil servants to present government policy to favour the governing party in a manner which goes beyond acceptable limits. Civil servants who believe that they have been asked to act in breach of the Civil Service Code or otherwise act unethically may complain to the Civil Service Commissioners, the self-regulatory body entrusted with promulgating and promoting the Civil Service Code and who are appointed directly by the Crown by Order in Council under the prerogative.[61] The Civil Service Commissioners do not, however, have any sanctioning power in relation to Ministerial conduct, although they may report on appeals "as they think fit," and this would enable them to report to Parliament on ministerial actions found to be in breach of the Code.[62] While Ministers are bound by the Ministerial Code, which imposes upon them a duty to refrain from asking civil servants to act in any way which would conflict with the Civil Service Code,[63] the keeping of the Ministerial Code lies with ministers themselves. The Code states that Ministers are "personally responsible for deciding how to act and conduct themselves in light of the Code and for justifying their actions and conduct to Parliament"[64] and refers to the Prime Minister as the "ultimate judge" of Ministerial standards of behaviour and the appropriate consequences for breach of those standards.[65] In other words, the (mis)conduct of ministers falls outside the scope of executive self-regulation, falling instead within the remit of Prime Ministerial and, in turn, Parliamentary oversight. Parliament is not, however, the only external body responsible for securing the accountability of executive action, for the courts also occupy an important role and it is to the potential regulatory role of courts

[61] Civil Service Code (revised May 1999), paras. [11–12] available at http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/civil_service_code.asp
[62] T. Daintith and A. Page, *The Executive in the Constitution* (Oxford 1999).
[63] Ministerial Code, note 28 above, para. [3.1].
[64] *Ibid.*, para. [1.3].
[65] Ministerial Code, *ibid.* para. [1.3].

that we now turn by considering judicial review of general government statements.

III. External Control Through Judicial Review

Not only is party political publicity prohibited by the civil service propriety conventions applicable to government communications, but concerns that a government publication constitutes improper party propaganda have, on occasion, provided the motivation for challenging its legality by way of judicial review. For example, in *R* v. *Secretary of State for the Environment ex p London Borough of Greenwich*[66] the then Labour-controlled London borough of Greenwich obtained a temporary injunction against the Secretary of State for the Environment, prohibiting the distribution of a controversial one million pound leaflet distribution campaign to explain the community charge (commonly known as the "poll tax") to 21 million homes, claiming that the leaflet was part of a "squalid party political propaganda exercise."[67] The central (Conservative) Government strongly denied these allegations, claiming that the campaign was a proper and desirable attempt to inform and explain the newly introduced charge to the public, with the then prime minister Margaret Thatcher staunchly defending the campaign as "very good value for money," claiming that the Government had "a clear duty to ensure that everyone knows what their main rights and duties are".[68]

Although the Divisional Court ultimately upheld the legality of the campaign following a full hearing of the dispute, the case provides a useful illustration of the potential of judicial review to act as a mechanism for safeguarding the integrity of government communications. Accordingly, the following discussion seeks to explore the capacity of judicial review to undertake this function. Although not all applicants who have sought to challenge government communications through judicial review have been motivated by a belief that the communication in question amounts to a form of improper political propaganda, their attempts to impugn particular government communications reflects a concern that audiences will be adversely influenced by the messages which the government seeks to convey. Seen in this light, the government's capacity to influence opinions and shape individual and institutional conduct through the provision of information and advice may be seen as a potentially valuable resource that may be

[66] *R.* v. *Secretary of State for the Environment, ex parte Greenwich LBC* [1989] C.O.D. 530 (hereafter "*Greenwich*").
[67] *The Times*, 10 May 1989.
[68] *Ibid.*

harnessed to implement its policy objectives. Daintith has collectively labelled government policy techniques that seek to utilise this capacity to shape behaviour through the provision of information and advice as forms of "suasion",[69] contrasting them with "imperium" techniques entailing the government's use of the command of law, on the one hand, and "dominium" techniques, that rely upon the deployment of government wealth, on the other. Suasion techniques have not been subject to extensive examination by legal scholars, perhaps because they have tended to concentrate on "imperium" forms of control, in so far as the analysis of legally enforceable rules backed by the coercive force of the state constitutes the staple diet of traditional legal scholarship. That said, several public lawyers have noted the growth and popularity of so-called "tertiary rules" in modern British government, referring to a wide array of governmental rules that are not directly enforceable through civil or criminal proceedings, including codes of practice, guidance, guidance notes, circulars, practice statements, codes of conduct and administrative rules, observing considerable variation in the extent to which they possess legally binding force.[70] Tertiary rules which are not legally binding on addressees may fairly be characterised as suasion-based techniques, but they form only a sub-set of suasion based techniques, for these may extend to non-rule based mechanisms, such as general public information campaigns or advice offered by government officials to particular persons.[71]

Unlike "imperium" techniques, which rely upon the unique coercive power of the state to shape social behaviour, the government does not enjoy an exclusive monopoly over the capacity to persuade and inform others. Public authorities typically rely upon the general power to communicate possessed by all legal and natural persons in order to employ suasion techniques and therefore they do not generally require express statutory authorisation to engage in activities of this nature. Accordingly, the cases examined in the following discussion are all concerned with public communications involving the exercise of *non-statutory power*, although there are numerous cases in which statements by public officials involving the exercise of statutory power have been

[69] T. Daintith, "Techniques of Government" in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford 1994), pp. 209–236; T. Daintith, "Regulation", in A. David *et al.* (eds.), *International Encyclopaedia of Comparative Law* (1973–2001), vol. XVII, ch. 10 ("State and Economy").

[70] R. Baldwin, *Rules and Government* (Oxford 1995), pp. 80–121; G. Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (London 1987).

[71] K. Yeung, "Government by Publicity Management: Sunlight or Spin?" [2005] P.L. 360.

subject to challenge by way of judicial review.[72] For limitations of length, the following discussion is also confined to government communications of a general nature rather than those singling out particular individuals in a potentially adverse manner and which may therefore affect individual rights to privacy or rights to specific procedural protection.[73]

While courts are now increasingly called upon to consider the legal consequences of policy statements issued by public authorities in judicial review proceedings, applicants bringing these policy statements and circulars before the courts typically seek to insist upon *adherence* to the stated policy, arguing that although not legally binding in the strict sense, the public promulgation of the statement generates "legitimate expectations" for the applicant that may not lightly be departed from. Many of the cases referred to in the following discussion, however, are concerned with the obverse situation: where the applicant seeks to *impugn* the policy statement so that it ought *not* be followed rather than demanding adherence. Applications by claimants seeking to impugn policy statements have been much less common than those seeking to insist on their adherence. Yet judicial recognition of the concept of legitimate expectations in the former kinds of case indicates that courts recognise that the functions of government place it in a position of providing information on which individuals should be able to rely. The need for integrity in governmental statements becomes even more important once it is appreciated that not only have tertiary rules proved invaluable as a means for providing guidance and advice to the general community, but they have also been used as a soft form of control, in order to influence the behaviour of other government units. It may therefore be useful to distinguish between communications addressed to other governmental actors (often taking the form of information circulars, memorandums of guidance and policy guidelines) and those directed at the members of the public (commonly in the form general information leaflets and other associated forms of publicity). As we shall see, although the former kind of government communication has been challenged more frequently than the latter, judicial review of both kinds of communicative activity throw up similar legal questions and encounter similar legal obstacles. In particular, two primary legal

[72] For a discussion of cases concerning the review of statutory powers to communicate, see Ganz, note 70 above. Academics have debated whether the non-statutory power of government to communicate is properly regarded as a prerogative power, given that such powers are possessed by all legal persons and it is not unique to the Crown. See B.V. Harris, "The 'Third Source' of Authority for Government Action" (1992) L.Q.R. 626; H.W.R. Wade, "Judicial Review of Ministerial Guidance" (1986) 102 L.Q.R. 173.

[73] C. Lewis, *Judicial Remedies in Public Law* (London 2000), pp. 127–32.

hurdles lie in the path of a successful judicial review challenge. First, the applicant must satisfy the court that it has jurisdiction to hear the claim, and secondly, that at least one of the recognised grounds for judicial review can be established. Accordingly, the following discussion begins with an examination of the first of these requirements, that of jurisdiction.

A. Jurisdiction

Applications for judicial review provide an important avenue through which public authorities are held legally accountable for their actions. Although numerous attempts to challenge the legality of government policy statements have been made, they commonly take the form of an indirect challenge, in which an applicant challenges the validity of a decision made by a public authority in *pursuance* of the policy statement, rather than challenging the *policy statement* itself.[74] Nonetheless, several direct challenges to government policy statements have been mounted, although their relative infrequency might be due in part to concerns about potential difficulties in establishing that a court has jurisdiction to entertain such claims. Doubts concerning jurisdiction may be attributed to the celebrated attempt by Mrs. Gillick, a devout Catholic and mother of five daughters under the age of 16, to challenge the memorandum of guidance issued by the Department of Health and Social Security to area health authorities which stated that a doctor might, in exceptional cases, give contraceptive advice and treatment to a girl under 16 without informing the parent.

Mrs. Gillick's challenge was ultimately unsuccessful, with the majority of the House of Lords finding that the advice contained in the circular was not unlawful.[75] Although the case is perhaps best known for the Court's approach to issue of consent by minors to medical treatment, relatively little attention has been paid to its approach to the question of jurisdiction, despite three members commenting on it. Lord Bridge (in the majority) considered that, as a general rule, non-binding non-statutory guidance cannot be subject to any form of judicial review.[76] He accepted, however, that a narrow exception to this general rule was established in *Royal College of Nursing*,[77] extending the courts' jurisdiction to situations in which a government department publicly promulgates non-statutory advice which is erroneous in law. But he warned that this

[74] Ganz, note 70 above.
[75] *Gillick v West Norfolk and Wisbech AHA* [1986] A.C. 112 (HL), hereafter "*Gillick*".
[76] *Gillick*, at p. 193.
[77] *Royal College of Nursing of the United Kingdom* v. *Department of Health and Social Security* [1981] A.C. 800 (HL), hereafter "*Royal College of Nursing (HL)*".

extended jurisdiction should be exercised with the "utmost restraint" because it would be rare for such a publication to raise clearly defined issues of law "unclouded by political, social or moral overtones."[78] In such cases, the court's role should be narrowly confined to deciding whether the proposition of law is erroneous and it should "avoid expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority."[79] While Lord Templeman agreed with Lord Bridge's cautionary warning against intervening on matters of social and ethical controversy, the advisory nature of the memorandum was in his view immaterial. For him, the relevant question was whether, by mistake of law, a public authority purports by the memorandum to authorise or approve an unlawful interference with parental rights.[80] Lord Scarman, in contrast, refers not to any alleged mistake of law, but refers instead to the classical Wednesbury test for review. For him, it was only if the guidance "permits or encourages unlawful conduct" in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way.[81]

Although *Gillick* clearly demonstrates that government circulars containing advice that is legally erroneous fall within the courts' jurisdiction, it leaves unsettled the status of Lord Bridge's so-called "general rule" that non-statutory governmental advice falls outside the courts' jurisdiction to review. Subsequent judicial authority appears to deny the existence of such a rule, although no court has explicitly disputed its correctness. For example, in *Northumbria Police Authority*[82] a Home Office Circular explained to Chief Police Officers that they could obtain supplies of riot equipment from a central Home Office store without approval of their local police authority. Although the circular was explanatory and permissive in nature (neither mandating nor encouraging Chief Police Officers to avail themselves of the Home Office store), its effect was to undermine the control exerted by local police authorities, prompting a local police authority to bring judicial review proceedings challenging the decision of the Home Secretary to issue and to apply the circular. The Court of Appeal displayed no hesitation in reviewing the legality of the Home Office's powers to issue the circular and to maintain a central store of riot equipment as set out in the circular, without discussing the question of

[78] *Gillick*, at p. 194.
[79] *Ibid.*
[80] *Gillick*, at p. 206.
[81] *Gillick*, at p. 181.
[82] *R* v. *Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] Q.B. 26.

jurisdiction. Similarly, in considering the Greenwich local authority's challenge to the central government's poll tax leaflet, the Divisional Court had no difficulty in accepting jurisdiction to consider the matter. While Woolf L.J. claimed that the court should only intervene in "exceptional situations" referred to by Lord Bridge in the *Gillick* case, his comments do not fully endorse those of Lord Bridge, for he also stated that, "The fact that the source of the power to issue the document is non-statutory is not fatal though relevant" although he failed to elaborate on how precisely the non-statutory source of power was relevant.[83] Likewise, in *ex parte Holmes*[84] the High Court considered the legality of a sample ballot paper attached to a leaflet issued to the general public explaining the shift to proportional representation in European Parliamentary elections without expressing any doubts about the courts' jurisdiction to entertain the claim.

I am only aware of one case in which Lord Bridge's reasoning in *Gillick* was adopted to deny jurisdiction to review the legality of a non-binding government circular. In *Westminster Press*[85] a newspaper editor applied for judicial review of a Home Office circular setting out non-mandatory guidance to chief police officers identifying the circumstances in which information may be given to the media, advocating a prohibition on press conferences while police investigations are on foot and charges pending. The applicant sought a declaration that the circular misstated the law, in that neither police publication of the name of an arrested or charged person nor publication by the press of such a name, constituted unlawful contempts of court. In resisting the application, the Home Secretary argued that the court had no jurisdiction to review non-binding, non-statutory government circulars, relying upon Lord Bridge's comments in *Gillick*. In accepting the Home Secretary's argument, Watkins L.J. (with whom Roche J. and Mann L.J. agreed) stated

> I have come to the conclusion that Circular No 115 cannot possibly be held to be an exception to the general rule referred to by Lord Bridge in the quotation above from his speech in *Gillick*. The Circular, including the Annex to it, is without doubt non-statutory guidance, not to a subordinate authority it is true, but to Chief Officers of Police, who may or may not accept that guidance although I feel sure they generally speaking welcome guidance from time to time from the Minister of the Crown who has a special responsibility for the

[83] *Greenwich.*

[84] *R* v. *Secretary of State for the Home Department, Ex parte Holmes*, Crown Office List CO/3149/199, 23 August 1999 (High Court), hereafter "*Holmes*".

[85] *R* v. *Secretary of State for the Home Department Ex parte Westminster Press Limited* (1991) Crown Office List ,CO/56/9, 2 December 1991 (High Court), hereafter "*Westminster Press*".

> enforcement of law and order and the proper and adequate policing of the Country along with, of course, local Police Committees. Thus I regard Circular No 115 as being not susceptible to judicial review albeit that it might be said to mis-state the law in some way.[86]

It therefore appears that, when reviewing the legality of non-binding government policy statements, courts have tended either to overlook Lord Bridge's so-called general rule or, as we shall see, generously interpret the "error of law" exception to this rule, thereby overcoming any jurisdictional hurdles to hearing the complaint. Yet despite their willingness to sidestep Lord Bridge's dicta, courts have fought shy of rejecting his views as incorrect or misguided. It is therefore worth pausing to excavate beneath the surface of Lord Bridge's comments to identify and reflect upon his reasons for refusing to recognise jurisdiction in these circumstances. In support of a general rule denying the court's jurisdiction, Lord Bridge emphasised two features of the memorandum in question: its non-statutory nature and its purely advisory character. He began with the proposition that, in general, the court's supervisory jurisdiction over the conduct of administrative authorities has been confined to ensuring that their actions or decisions were taken within the scope of the power which they purported to exercise or, conversely, to providing a remedy for an authority's failure to act or to decide in circumstances where some appropriate statutory action or decision was called for.[87] But the memorandum that Mrs. Gillick sought to challenge had no statutory force whatever. It was purely advisory in character and NHS practitioners were, as a matter of law, in no way bound by it. Accordingly, the memorandum was not, in Lord Bridge's opinion, open to review on traditional Wednesbury principles on the ground that it involves an unreasonable exercise of a statutory discretion because there was no specific statutory background by reference to which the appropriate Wednesbury questions could be formulated.[88] Although he recognised that the issue by a department of government in a particular field of non-statutory guidance to subordinate authorities operating in the same field had become a familiar feature of modern administration, the advice tendered in such non-statutory guidance could not, as a general rule, be subject to any form of judicial review.

While Lord Bridge was technically correct to conclude that the exercise of *non-statutory* powers by public authorities are not

[86] *Westminster Press*.
[87] *Gillick*, at p. 192.
[88] *ibid*.

amenable to judicial review on the grounds that they involve the unreasonable exercise of *statutory* power, in the previous year the House of Lords had firmly established, in the celebrated *GCHQ*[89] case, that non-statutory powers are reviewable on Wednesbury grounds, provided that they are justiciable in nature. But although the non-statutory source of the power upon which the memorandum relied does not exclude the court's jurisdiction to review, its non-binding nature may have jurisdictional significance. Endorsing Lord Bridge's comments, Wade has argued that the mere giving of advice does not involve the exercise of legal power, nor the default of legal duty, so that there can be no exercise of power upon which judicial review can bite.[90] At the heart of this approach lies a particularly narrow conception of what it means for a public authority to exercise "power", defining it in terms of the "ability to alter legal rights". Yet such a restricted conception of the scope of judicial review is supported neither by the weight of authority nor principle. The trend of judicial authority since *GCHQ* has favoured a broad interpretation of the exercise of public power, focusing on the nature and practical consequences of government decision-making, rather than the source of power in issue. The courts' increasingly liberal approach is reflected both in their willingness to review public authority actions that have the potential to affect the interests and "legitimate expectations" of individuals, falling short of an interference with legal rights, and in extending judicial review to bodies that are considered to undertake "public functions" although they are not exercising statutory power.[91]

From the viewpoint of principle, it may be argued that, although the actions of public authorities might not alter legal rights and duties, they may nonetheless have significant and far-reaching consequences so that judicial supervision is required to guard against abuse. Safeguards may be particularly important in relation to the use of suasion techniques, which are specifically intended to bring about behavioural change without enlisting the coercive force of law. For example, the use of published performance targets within public administration may have significant practical (indeed, sometimes profound) consequences for those falling within the remit of the target regime, although they may not alter legal rights or duties. In this respect, the approach taken by the New Zealand High Court in response to a judicial review application by Auckland University, challenging the

[89] *Council of Civil Service Unions* v. *Minister for Civil Service* [1985] A.C. 374 (HL), hereafter "*GCHQ*".
[90] Wade, note 72 above, at p. 175.
[91] *R. (on the application of Datafin plc)* v. *Panel on Takeovers and Mergers* [1987] Q.B. 815.

proposed publication by the New Zealand Tertiary Education Commission (the "TEC") of a comparison of research performance between New Zealand institutions with their British counterparts in its first Performance Based Research Funding Report, is to be welcomed. In granting an interim injunction prohibiting publication of the International Comparison, Williams J. rejected the TEC's argument that its proposed publication was no more than an opinion contrasting New Zealand and United Kingdom research achievements. He acknowledged that, although the publication of the report did not alter the applicant's legal rights, it nonetheless involved the exercise of a power by the TEC which had "important public consequences",[92] noting that "undoubtedly" attempts would be made by students, academic staff, research funders and institutions around the world to compare the research excellence of New Zealand universities with other university institutions on the basis of any International Comparison published by the TEC. Moreover, the court recognised that when a state agency (such as the TEC), experienced and skilled in comparing, assessing and evaluating research, publishes a report comparing the research achievements of New Zealand universities against their British counterparts, "the results will be accorded an official status, an imprimatur no other comparison could hope to approach."[93] Accordingly, the court had jurisdiction to consider the complaint, finding in favour of the applicant on the basis that the TEC had acted unlawfully by failing to provide adequate notice and consultation rights in relation to the proposed international comparison.

The need for judicial supervision is all the more pressing once it is recognised that non-statutory power may be employed by public authorities to circumvent statutory controls, thereby illegitimately enlarging their powers de facto. The use of non-binding policy statements and circulars provides a means by which a public authority may seek to exercise influence beyond the bounds of its statutory limits, constituting a form of "regulatory creep."[94] The need for judicial vigilance in guarding against abuses of power in this form is summed up by Lord Denning in considering a challenge by the Royal College of Nurses to a Department of

[92] *University of Auckland v Tertiary Education Commission,* High Court of New Zealand CIV 2004–404–1304, 5 April 2004 at para. [54].

[93] *Ibid.*, at para. [30].

[94] Better Regulation Task Force, *The Challenge of Cultural Change: Raising the Stakes,* Annual Report, 2004 at www.brtf.gov.uk/docs/pdf/brtftext04.pdf: "... regulation or compliance with regulation that goes beyond the original source of authority or intention. What is on the statute book can be added to, in a variety of ways, by Government Reports, independent reports including ombudsman and industry bodies. Regulatory creep conflicts with principles of good regulation."

Health circular which stated that nurses were empowered to perform abortions by the prostaglandin-induction method, provided that the abortion was supervised by registered medical practitioner who did not need to be physically present throughout the procedure. In concluding that the Abortion Act 1967 did not authorise nurses to carry out such procedures, Lord Denning stated

> I think that the Royal College are quite right. If the Department of Health want the nurses to terminate a pregnancy, the Minister should go to Parliament and get the statute altered. He should ask them to amend it by adding the words "or by a suitably qualified person in accordance with the written instructions of a registered medical practitioner." I doubt whether Parliament would accept the amendment. It is too controversial. At any rate, that is the way to amend the law: and not by means of a departmental circular.[95]

Recognition of the courts' jurisdiction to review non-statutory governmental advice entails no radical extension of judicial power. Rather, the courts may simply be seen as applying the *De Keyser* principle, preventing public authorities from using their non-statutory powers to avoid statutory limitations.[96] Acceptance of jurisdiction in these circumstances is also consistent with the approach underlying the Human Rights Act 1998, which imposes a duty on all public authorities to respect Convention rights, whether or not the power wielded is statutory or non-statutory in nature and whether or not the legal rights of the applicant are affected, provided that the applicant can establish that she has standing to sue.

B. Grounds for Review

Even if an applicant seeking to challenge the non-statutory policy statements of a public authority can overcome jurisdictional objections, a judicial review application will only succeed if one of the recognised grounds of judicial review can be established. Although the House of Lords in *Gillick* may be interpreted as limiting the grounds for review to errors of law, individual members of the House differed in their understanding of the scope of this ground for review. On the one hand, both Lord Bridge and Lord Templeman applied this ground strictly, so that the onus lay on the applicant to establish that the law absolutely prohibits the

[95] *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] A.C. 800 at 806–7. However, the decision was overturned by the House of Lords, upholding the legality of the contents of the circular: *Royal College of Nursing (HL)*.

[96] *Attorney General v De Keyser's Royal Hotel Ltd.* [1920] A.C. 508. (HL). *E.g. Liverpool City Council* v. *The Baby Products Association*, Crown Office List CO/3733/99, 23 November 1999 (High Court).

conduct recommended in the memorandum of guidance. In contrast, Lord Scarman seemed to interpret this ground more flexibly, regarding errors of law as a species of Wednesbury unreasonableness, commenting that if the guidance "permits or encourages" unlawful conduct in the provision of contraceptive services, it can be set aside as being the exercise of a discretionary power in an unreasonable way.[97] Subsequent authorities appear to have favoured a more liberal approach, permitting review on the basis of Wednesbury unreasonableness in the sense of meaning "irrational," and extending the grounds of review in some cases to Wednesbury principles in the broader sense, thereby granting review on the basis that the memorandum was based on irrelevant considerations, failed to take relevant considerations into account or was otherwise motivated by some improper purpose.

The trend towards liberalisation of the grounds of review is evident in Woolf L.J.'s consideration of the legality of the Central government's poll tax leaflet in *ex p Greenwich*, where he appeared to extend the grounds of review in two ways. First, not only does he confirm error of law as a ground of review recognised and applied in *Gillick*, but he extends this ground by stating that courts may also intervene by giving declaratory relief if a publication is "manifestly inaccurate or misleading," although he emphasised that in practice the power to intervene would only be exercised in exceptional cases. Secondly, Woolf L.J. stated that courts may also intervene on conventional Wednesbury grounds, commenting that

> To succeed on Wednesbury principles, it must be shown that the decision to issue the document in the form in which it was published was fatally flawed because, for example, it amounts to such a distortion of what purported to be the objects of publishing the document that it is clear that no proper consideration was given to issuing the document in that form or some irrelevant consideration was taken into account or that it was issued for some collateral purpose (in the Padfield sense) or that the discretion was being exercised perversely.

Similarly, the application of Wednesbury unreasonableness as a basis for reviewing government guidance is also usefully illustrated by the court's approach in *ex p Holmes*.[98] The case concerned an application by the leader of the UK Independence Party challenging a leaflet published and distributed by the Home Office that sought to explain to the electorate the new proportional representation system of voting in European Parliament elections. The applicant alleged that the sample ballot paper included in the leaflet

[97] *Gillick*, at p. 181.
[98] *Holmes*.

discriminated against minority parties because it listed the three main UK political parties, thereby giving them an unfair advantage, while also listing a series of fictitious parties. Prior to the publication of the leaflet, the Home Secretary had sought advice from the Constitutional Unit about the form of the sample ballot paper, which advised him that the "safest" course was to replace party names with "Party A, Party B, etc.," although this would be a "less realistic" ballot paper then the one used. Despite this advice, the Home Secretary proceeded instead with the more "realistic" version of the sample ballot paper which listed the three main parties. In dismissing the claim, Sullivan J. observed that, when confronted with a real practical difficulty in devising the sample ballot paper, the Home Secretary was faced with a choice between the "realistic, the whimsical, and the safe" form of sample ballot paper. While it was readily understandable why the Home Secretary did not favour the whimsical approach, his failure to adopt the safe form of ballot paper did not render his decision Wednesbury unreasonable. In reaching this conclusion, Sullivan J. recognised that in seeking to communicate to the public, there may be a need to strike a balance between the need for realism with the risk of unfairly advantaging particular parties, a balance which the Home Secretary was entitled to reach. The question was not whether a better form of sample ballot paper might have been devised, but whether the form used was so unfair or confusing that no reasonable Home Secretary could have caused it to be distributed to the electorate at large.

C. Summary

The above cases involve attempts to impugn the legality of government pronouncements through judicial review proceedings. Although attempts have been made to challenge the legality of government communications for general public consumption (such as the poll-tax leaflet for household distribution, and a research assessment report evaluating the performance of tertiary institutions), most challenges have been directed at government circulars and other forms of non-binding policy guidance that are directed at other governmental units/actors, aimed at seeking to influence their behaviour. Despite differences in their target audience, both types of publications may be understood as suasion techniques, used by public officials in order to shape individual and institutional behaviour. Although there is some doubt about the courts' jurisdiction to entertain such claims, originating from the judgement of Lord Bridge in *Gillick*, there has been a general trend towards a more liberal approach, with courts appearing to be

increasingly willing to review the legality of such publications. Likewise, courts appear to have become increasingly liberal in the grounds upon which a judicial review challenge to non-binding non-statutory public statements may be framed: initially focusing on error of law but expanding their remit to consider challenges based on Wednesbury unreasonableness in both the broad and narrow senses, including claims that the publication may be "manifestly inaccurate or misleading." But despite these liberalising trends, courts have been reluctant to interfere with the exercise of presentational discretion by public officials in promulgating non-binding advice or instruction, partly due to their conception of their role within the British constitutional framework for scrutinising executive action, particularly in relation to alternative mechanisms for safeguarding the integrity of government communications. Accordingly, it is to the relationship between internal and external mechanisms of scrutiny to which we now turn.

IV. The Relationship Between Internal and External Mechanisms of Scrutiny

Having separately examined executive self-regulation and judicial review as mechanisms for scrutinising and ensuring the integrity of government communications, the final section of this paper provides a critical comparison of their respective scope and roles, identifying similarities, differences and areas of overlap. Although the substantive norms embodied within each system of oversight serve to safeguard the integrity of government statements, their respective roles are distinctive and complementary. The primary aim of the propriety conventions, and the institutional framework within which they are applied and enforced, is to ensure that government communications serve the *proper purposes of government* through the dissemination of information and advice to promote the public interest. The propriety conventions are concerned to ensure that the government's communications are objective, impartial and informative in nature, safeguarding against the improper use of government information apparatus to pursue party-political ends. By contrast, judicial review of government circulars, guidance and advice is primarily concerned with ensuring its *legality*, understood largely in terms of the accuracy and reliability of government statements, reflected in the grounds upon which judicial review is available.

Despite the distinctive functions of executive self-regulation and judicial review in securing the integrity of government information,

they share several similarities. Both may entail some form of content regulation, requiring an examination of content of specific publications to identify whether it falls foul of a set of substantive norms that prescribe the boundaries of legitimate government communications. In making that assessment, sensitive judgements may be required that may fall within a broad margin for reasonable disagreement about where the line of acceptability should be drawn, involving some inescapable subjectivity of judgment. So, for example, in circumstances where the government seeks to inform the public of its policies and persuade the public of their value and importance, it may be difficult to determine with confidence whether this strays beyond legitimate positive policy exposition into the realm of illegitimate party propaganda in breach of the propriety conventions. Similarly, a court's task in determining whether a given government pronouncement is misleading may be far from straightforward, given that particular statements contained in a publication may be literally accurate, yet the publication as a whole might nonetheless be misleading if significant matters are omitted or used out of context. Equally, it is also possible that a publication may include statements that are not wholly accurate, particularly if couched in a simplified form to facilitate ease of comprehension, yet the publication as a whole may not be thought misleading when examined in light of the broader context and purposes for which they are conveyed. In other words, while blatant abuses might be readily identifiable, both oversight mechanisms require the application of judgement within the context of a broad area of discretion where there will be considerable room for differences of opinion about the acceptability of particular publications.

Although each mechanism may be seen as playing distinctive and complementary roles in securing the integrity of government information, they are not mutually exclusive. Overlap may arise in at least two ways. First, both sets of norms may operate concurrently. Hence a single publication might be objectionable on the basis that it contravenes the propriety convention whilst also falling foul of the grounds of judicial review. Second, there is a degree of overlap in the substantive norms embodied within the two regimes. For example, a government publication that is in breach of the propriety conventions because it is designed to promote party political purposes may also be Wednesbury unreasonable on the basis that it involves the exercise of governmental power for an improper purpose. There is no apparent reason why the concurrent operation of both mechanisms should be considered problematic in either of these situations,

provided that each institution remains within the boundaries of its competence. In this respect, the court's approach in *ex p Greenwich* reveals an appropriate degree of respect for the propriety conventions and the need for some form of judicial oversight, whilst displaying sensitivity to the limitations of judicial review.

Although the Greenwich borough's fundamental objection to the poll-tax leaflet was its alleged party political purpose (thus violating the propriety conventions), its legal objections to the leaflet were framed in terms of its allegedly misleading nature. In particular, it complained that the leaflet was "manifestly inaccurate and misleading" because it failed to explain that cohabiting partners and spouses could be jointly and severally liable for the community charge. In considering this allegation, Woolf L.J. critically examined the Department's reasons for omitting this information. He observed that the Department's purpose in publishing the leaflet was to explain in a short leaflet the principal features of the charge, and that it refrained from referring to the joint and several liability of cohabiting partners and spouses for several reasons. First, in carrying out their statutory duty to ensure that residents were registered for the charge, local authorities had been encouraged to use a model registration form and guidance notes which clearly explained joint and several liability. Second, it was clear from the leaflet itself that it was not a full exposition of all the provisions of the legislation, inviting the reader to obtain further material both generally and on particular aspects of the charge. Thirdly, the leaflet was concerned with explaining how individuals were required to register in relation to the charge, yet the question of joint and several liability only arose at the later enforcement stage. Finally, although the leaflet was to be widely distributed, it was only one of a series of methods to be used to disseminate information about the effect of the legislation. On this basis, the court considered that the Department's decision to omit references to joint and several liability in the leaflet was not unreasonable in the Wednesbury sense.

Ex p Greenwich demonstrates how the overlapping reach of judicial review and executive self-regulation as expressed in the propriety conventions may affect the courts' approach to judicial review. While the court in *ex p Greenwich* undertook a careful examination of the specific motives of the Department in deciding to publish the leaflet without referring to the joint and several liability of cohabiting couples, it did not attempt to assess whether its publication was motivated by party-political aims in breach of the propriety conventions, and the applicant (correctly, in my view)

did not make this assertion in court. Although the court rejected Greenwich borough's claim that courts may intervene on the grounds that there has been a departure from the standards of good administration as reflected in the propriety conventions, the conventions nonetheless impinged directly upon its task in two ways. First, failure to adhere to the conventions may indicate an improper exercise of governmental power. As Woolf L.J. stated, "The court in exercising its role of judicial review can regard the conventions as providing guidance as to what are the proper standards and if the government has not complied with the convention that may be an indication that the government has not exercised its powers properly."[99] Second, the existence of a scheme of internal oversight in which the conventions were developed and applied and which operates alongside and in conjunction with Parliamentary scrutiny of executive action, affects the court's conception of its own role and the degree of scrutiny that it applies in carrying out its supervisory function. Woolf L.J. pointed specifically to paragraph 16 of the propriety conventions, which explains that the power of central government to spend money on advertising and publicity is derived from the principle that the Crown can do anything an ordinary person can do provided that there is no statute to the contrary and Parliament has voted the money, and that the safeguard for ensuring that this power is properly exercised lies in the government's accountability to Parliament for all that they do and spend. Accordingly, it was not the task of the courts to act as a critic or censor of information published by the government or anyone else, in the absence of specific legislative authority, for the primary safeguard should be provided by the government's accountability to Parliament. Thus, in the case of publications such as the poll-tax leaflet, "the courts must be scrupulous not to usurp what should be the proper role of Parliament".[100]

In other words, although breach of the propriety conventions may indicate that governmental power has been exercised improperly, the courts consider that the primary responsibility for ensuring integrity in government communications rests with Parliament through the convention of ministerial responsibility. While courts do not appear to have limited the grounds upon which they have been prepared to review non-statutory government advice to errors of law in the manner adopted by Lord Bridge in *Gillick*, they have maintained his commitment to a light-handed degree of scrutiny. Underpinning this judicial self-restraint is a

[99] *Greenwich*, at p. 7.
[100] *Greenwich*, at p. 6.

concern by courts against intruding too far into the realm of matters of substantive policy which they rightly consider should more appropriately be left to Parliament. This is particularly true of matters of presentational discretion, where there is a wide margin for disagreement about (i) substantive matters of political/ethical controversy (ii) presentational matters concerning what to communicate and how to communicate most effectively. As Woolf L.J. stated in *ex p Greenwich*

> The line between what is acceptable and what is not acceptable can be extremely narrow and it can be very much a matter of opinion and there will always be a grey area on which judgements can differ, though there can be little room for argument about the obvious case.[101]

Although he readily accepted that courts have jurisdiction to review non-statutory government statements on Wednesbury grounds, Woolf L.J. emphasised that "in practice this will prove to be very much an exceptional power which should not be exercised where publication falls within the grey area".[102] In the language of judicial review, questions concerning the propriety of specific government pronouncements and publications will often raise questions that are not readily justiciable, in the sense that they are not readily amenable to resolution by judicial adjudication, both because of the subjective and political nature of the judgements involved, and the courts' lack of institutional competence to deal with such questions. Accordingly, courts appear rightly to regard Parliamentary scrutiny as the primary mechanism for overseeing and ensuring the integrity of government pronouncements, conceiving their own role as a more limited, secondary form of oversight.

V. Conclusion

Public officials from all levels of government routinely seek to communicate: from the highest levels of government, such as the issuing of the infamous Iraq dossier from the Prime Minister's office in order to support the case for war, through to information leaflets distributed to households to inform and explain to citizens their legal rights and responsibilities. It has long been recognised that the use of "suasion" techniques may be a potentially powerful policy instrument through which behaviour may be shaped and influenced, not only through paid for publicity but also through more routine administrative channels, such as policy guidelines and announcements, information circulars and other forms of

[101] *Greenwich*, at p. 5.
[102] *Ibid.*

explanatory material. Citizens place considerable reliance upon government sources in seeking guidance concerning potentially significant hazards affecting individual health, safety and security, underlining the need for accuracy and reliability in government information. Not only does the government seek to communicate directly to citizens in order to inform and explain matters likely to affect them directly, but government communications are also used extensively as a soft form of control, directed at other government units with the deliberate aim of shaping and constraining the latter's behaviour. Because such techniques rely upon persuasion, rather than coercion, as a means for influencing individual and institutional decisions and behaviour, they may not directly affect legal rights and duties. It does not follow, however, that the impact and consequences of government pronouncements is necessarily weak or insignificant, as the Iraq dossier powerfully demonstrates.

In this so-called "age of spin" that is claimed to characterise modern political communications, the need for effective institutional mechanisms to ensure and safeguard the integrity of government communications becomes even more pressing. This paper has explored two such mechanisms: executive self-regulation (via the civil service propriety conventions applicable to government information) and judicial review (as a means for challenging the legality of general government pronouncements), each serving distinctive, complementary yet overlapping functions. Executive self-regulation is primarily concerned to ensure that government communications serve the proper purposes of government, that is, promoting the public interest through objective, impartial and informative communications, rather than for the pursuit of party political ends. Judicial review of general government pronouncements is primarily concerned to ensure the legality of such pronouncements, in which legality is understood largely in terms of accuracy, reliability and fidelity to law, reflected in the grounds of judicial review. In other words, each mechanism is directed towards a particular kind of "spin": executive self-regulation is concerned with avoiding attempts to use public resources to advocate a party political position, while judicial review is concerned to safeguard against various presentational strategies which may confuse, mislead or otherwise misrepresent the state of the law.

Although both mechanisms operate concurrently, the scope of each system of oversight is delineated by reference to the supervisory role of Parliament in holding ministers to account for the integrity of government communications through the constitutional convention of ministerial responsibility. Accordingly,

courts properly regard their role in safeguarding the propriety of government statements as secondary in nature, readily accepting jurisdiction over complaints, yet equally quick to defer to the executive on matters concerning the exercise of presentational discretion. The apparent contradiction in the courts' approach may be readily explained on the basis that courts recognise, on the one hand, that public pronouncements may have far-reaching consequences, although they may not alter legal rights and duties, so that the mere acceptance of jurisdiction to review such pronouncements may serve as a deterrent against abuse. On the other hand, courts also recognise that government officials may have to balance a series of conflicting objectives, particularly when communicating to the public: effective public communication may require simplicity at the expense of accuracy, in which comprehensibility is prioritised over comprehensiveness. In these circumstances, courts rightly acknowledge that the exercise of presentational discretion is properly the preserve of the executive, subject always to ministerial accountability via Parliament, so that the intensity with which courts exercise their jurisdiction to review general government statements is appropriately light-touch.

Likewise, the system of internal self-regulation which restrains and informs the boundaries of legitimate civil service activity, does not extend to ministerial conduct. In the contemporary political climate, the deeply held and long cherished values of neutrality and impartiality upon which the modern British civil service has been constructed and which are reflected in the propriety conventions are most at threat, not from civil servants themselves, but from ministerial overreaching. The temptation faced by Ministers to present their policies as vigorously and positively as possible may cause them (consciously or otherwise) to impose pressure on civil servants working in government communications to stray beyond legitimate policy exposition into the territory of illegitimate party propaganda. Ministers are, however, constitutionally responsible to Parliament for their conduct and decisions and thus they fall outside the scheme of executive self-regulation upon which the organisation and oversight of the civil service rests.

But the preceding examination of the propriety conventions embodied within the existing framework of executive self-regulation for ensuring integrity in government communications highlights the impossibility of distinguishing legitimate vigorous policy exposition from illegitimate party propaganda in any coherent and principled manner. The role of the special adviser is, at least in theory if not in practice, seen as a valuable mechanism for mediating the overlap, acting as a "political buffer" serving both to preserve the

political impartiality of civil servants while acting as a channel of communication between the government and governing party. Yet the communications role of the special adviser appears to have had the opposite effect, serving to undermine rather than reinforce public trust in the integrity of government communications. But although it is difficult to resist the urge to lay blame at the feet of individual "spin doctors," of whom Blair's former Director of Communications, Alistair Campbell, is the most notorious, it may be that the institutional position occupied by the special adviser places her in a position of conflicting loyalties. On the one hand, special advisers are civil servants appointed under prerogative powers, and are therefore bound by the Civil Service Code. On the other hand, they also serve their appointing political party, to whom their primary allegiance might be expected to lie: in practice, if not in theory, given that special advisers lack permanent tenure so that their position is dependent upon sustaining the confidence of their political masters. Although these two roles may be seen as broadly aligned in the communications context, in so far as effective public communication ultimately depends on public trust in the integrity and credibility of the communicator, the demands of the contemporary media industry, with its insatiable appetite for news in which social institutions compete for press coverage, the short term demands for positive media coverage for political gain may inevitably overshadow the long term need to generate and sustain public trust.

While both executive self-regulation and judicial review make an important contribution towards securing the integrity of government communications, their role is secondary and limited in nature. The scope of both systems is appropriately circumscribed by the nature of the supervisory task itself. At heart, much of the difficulty lies in the lack of consensus about the ethicality of particular presentational strategies and, ultimately, to the slipperiness and ambiguity inherent in the concept of spin itself. While it is relatively easy to identify forms of spin lying at the ends of the presentational spectrum, in which the positive presentation of government policy is widely accepted as legitimate, while the deliberate lying and deceit is unquestionably illegitimate, there is enormous room for disagreement about whether particular presentational strategies lying somewhere between these two polarities should be regarded as ethically acceptable. The government's responsibility for exercising its presentational discretion, not only in deciding what to communicate, but also how to communicate it, requires sometimes delicate and inescapably subjective (and hence political) judgment. Seen in this light,

Parliament is the only institution that has the democratic legitimacy to exercise this judgment. The persistence of low levels of public trust in government communications may provide further evidence of the inability of Parliament to carry out its supervisory role effectively, particularly in the face of executive dominance that has long been lamented by British constitutional lawyers. While the "soft" nature of suasion techniques of control may be thought to undermine their effectiveness relative to the coercive force underpinning imperium techniques, it is their very softness that allows them to elude "hard" forms of oversight. In this context, correspondingly "soft" mechanisms of oversight, such as a well-developed system of ethical norms, may be needed: yet it is the very absence of consensus over the ethical contours of the nature of spin itself that enables government spin to flourish largely beyond the realm of regulatory oversight.